

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**E.H., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE  
Aberdeen, MD, Employer**

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**Docket No. 17-0525  
Issued: December 15, 2017**

*Appearances:*

*Jeffrey P. Zeelander, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEN Duffy KIKO, JUDGE  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On January 9, 2017 appellant, through counsel, filed a timely appeal from July 28 and December 27, 2016 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUES**

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation benefits effective August 21, 2016; and (2) whether appellant met her burden of proof to establish continuing employment-related disability after August 21, 2016.

## **FACTUAL HISTORY**

OWCP accepted that on May 18, 2015 appellant, then a 53-year-old rural carrier, sustained a sprain of the left shoulder and upper arm acromioclavicular (AC), and sprain of other specified sites of the left hip, left thigh, left knee, and left leg while in the performance of duty. Appellant stepped out of her truck to deliver mail to a box and the sidewalk crumbled. She pulled her left foot out of a hole. Appellant stopped work on May 19, 2015 and has not returned to work.

OWCP authorized appellant to undergo a left knee arthroscopy and medial chondroplasty of the patellofemoral joint and lateral femoral condyle performed on August 27, 2015 by Dr. John A. Prodoehl, an attending Board-certified orthopedic surgeon.

In a November 10, 2015 medical report, Dr. Prodoehl noted appellant's left knee, left hip, and left shoulder symptoms and described findings on physical examination. He provided an impression of status post left knee arthroscopy, left shoulder impingement, left hip strain, cervical radiculopathy, and C4-5 herniated nucleus pulposus. Dr. Prodoehl related that appellant would remain out of work until further notice. He further related that the diagnosed conditions were directly related to her May 18, 2015 work injuries.

On January 6, 2016 OWCP referred appellant, together with a statement of accepted facts (SOAF), a set of questions, and the medical record, to Dr. Willie E. Thompson, a Board-certified orthopedic surgeon, for a second opinion. In a January 22, 2016 report, Dr. Thompson detailed her history, reviewed the medical record and SOAF, and provided findings on examination. He found no evidence of any residuals of the accepted work conditions. Dr. Thompson reasoned that the examination findings were within normal limits. He advised that appellant could return to work immediately with no restrictions, continued medical treatment, or additional diagnostic testing.

On February 26, 2016 OWCP determined a conflict in medical opinion existed between Drs. Prodoehl and Thompson regarding appellant's residual disability. It referred her, together with a SOAF, a set of questions, and the medical record, to Dr. Kevin E. McGovern, a Board-certified orthopedic surgeon, for an impartial medical examination.

In his March 25, 2016 report, Dr. McGovern reviewed the medical record and noted a history of the accepted May 18, 2015 work injuries and appellant's medical treatment. Appellant had ongoing pain and occasional giving way in her knee. She also had pain in her left buttock that radiated towards her groin and left shoulder and stiffness in her left shoulder. Appellant rated her pain as 7 out of 10 on average and 9 out of 10 at worst. She reported that her pain interfered with standing, sleeping, and daily activities. It also affected lifting, squatting, bending, standing, reaching, walking, sitting, kneeling, stair climbing, and tasks completed with her

hands. On examination, appellant had full right shoulder motion. Left shoulder motion was reduced voluntarily secondary to pain at 80 percent of normal. There was no atrophy, redness, or warmth. Appellant had diffuse tenderness around the shoulder. Good elbow and wrist motion were noted. Strength was symmetrical although she complained about pain with strength testing of her left shoulder. The left hip had full motion with pain on internal rotation. Appellant complained about tenderness in her buttock and groin. There was no crepitus, instability, trochanteric tenderness, redness, or warmth. The left knee had well-healed arthroscopic incisions. Motion was 0 to 125 degrees. There was no measurable thigh atrophy. Appellant complained about tenderness anteriorly and medially. McMurray's and Homan's tests were negative. No instability or calf tenderness was noted. A left hip x-ray showed mild narrowing of the medial hip joint space. A left shoulder x-ray revealed degenerative AC joint changes with joint narrowing and hypertrophic changes of the distal clavicle. A left knee x-ray revealed mild narrowing of the medial joint space. Some spiking of the tibial spines was noted. Dr. McGovern provided an impression of left shoulder strain and left hip and left knee sprain as a result of the May 18, 2015 injury. The subsequent left knee arthroscopic surgery revealed findings of degenerative arthritis which were unrelated to the May 18, 2015 injury. Dr. McGovern advised that preexisting degenerative arthritis in the hip and shoulder in the AC joint was noted on magnetic resonance imaging (MRI) scans. He noted that appellant's prognosis was good and she was capable of returning to full-duty work as a rural carrier with no limitations. Dr. McGovern maintained that there should be no expansion of the accepted conditions based on her May 18, 2015 work injury. Appellant had only mild residual stiffness in her shoulder as a result of her injuries. Dr. McGovern concluded that her preexisting arthritis in her knee, shoulder, and hip were not aggravated as a result of her work injury.

On June 26, 2016 OWCP proposed to terminate appellant's wage-loss compensation benefits based on Dr. McGovern's report. It afforded her 30 days to submit additional evidence or argument if she was in disagreement with the proposed action.

OWCP received daily notes dated April 22 to June 24, 2016 from appellant's physical therapist. In an August 11, 2015 left shoulder MRI scan report, Dr. Waseem K. Khan, a Board-certified radiologist, found mild supraspinatus and infraspinatus tendinosis with articular surface fraying and mild AC osteoarthritis. He noted that no high-grade partial-thickness or full-thickness rotator cuff tear was identified.

In a July 25, 2016 report, Dr. Harry A. Doyle, a Board-certified psychiatrist and neurologist, reviewed a SOAF and appellant's medical record. He noted a history of her June 22, 2010, September 21, 2012, and May 18, 2015 work injuries.<sup>3</sup> Dr. Doyle also noted appellant's current physical and emotional complaints and medical history. He reported findings on mental examination and diagnosed moderate major depressive disorder and somatic symptom disorder with pain. Dr. Doyle diagnosed appellant's June 22, 2010 work conditions which included right-hand contusion, right hand crushing injury, right radial styloid tenosynovitis, and right radial nerve lesion. He also diagnosed conditions related to her September 21, 2012 work injury which included sprain of the right knee and leg, right knee chondromalacia, medial

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<sup>3</sup> Appellant's claims for her June 22, 2010 and September 21, 2012 work injuries are assigned OWCP File Nos. xxxxxx370 and xxxxxx868, respectively. These other claims are not presently before the Board.

meniscus tear of the right knee, and abrasion of other multiple or unspecified sites without infection. Dr. Doyle noted appellant's May 18, 2015 work injuries which included a sprain of the left shoulder and upper arm AC, left hip, left thigh, left knee, and left leg. He related that she continued to have chronic pain and associated physical impairments due to residuals of the work injuries and had become progressively depressed by the cumulative impact of her physical impairments on her ability to function at work and home, resulting in her current depressive condition. Dr. Doyle, therefore, opined that appellant's diagnoses of major depressive disorder and somatic symptom disorder with pain were due to the cumulative effects of her work injuries. He maintained that she was temporarily totally disabled from performing her rural carrier duties or any other gainful employment. Dr. Doyle further maintained that appellant's residual physical and psychiatric impairments prevented her from performing at a consistent pace without an unreasonable number of rests, maintaining attention and concentration for extended periods, comprehending and following complex instructions, performing repetitive tasks on an ongoing basis, coping with work stressors, relating appropriately to coworkers and supervisors, and completing a normal workweek without interruptions from psychologically based symptoms. In addition, she was at increased risk for further psychological decompensation and worsening of depressive symptoms. Dr. Doyle recommended that she undergo a course of psychiatric treatment, including medication management.

By letter dated July 26, 2016, counsel contended that OWCP inappropriately merged the issues of whether appellant had any continuing employment-related residuals and whether she had any work-related disability. He further contended that the SOAF upon which Dr. McGovern based his opinion was deficient as it did not contain an accurate description of the mechanism of her injury or her two prior work-related right-hand and right knee injuries. Counsel asserted that Dr. McGovern had not resolved the medical conflict between Drs. Prodoehl and Thompson as he found that appellant continued to have residuals of the work injury and created a new conflict between him and Dr. Prodoehl regarding the level of her impairment. He asserted that based on Dr. Doyle's report she sustained emotional conditions that resulted in her total disability as a consequence of residuals from her current and prior work injuries. Counsel requested that these conditions be added to appellant's claim.

In a July 28, 2016 decision, OWCP terminated appellant's wage-loss compensation benefits effective August 21, 2016. It found that the special weight of the medical evidence rested with Dr. McGovern's impartial opinion. OWCP did not terminate appellant's medical benefits. Although it referenced the issue of expansion of her claim, it did not issue a final decision.

By letter dated August 24, 2016, appellant, through counsel, requested a review of the written record by an OWCP hearing representative. He reiterated his prior contentions set forth in his July 26, 2016 letter. OWCP received several diagnostic test reports from Dr. Timothy Chen, a Board-certified radiologist. In a June 23, 2015 left hip MRI scan report, Dr. Chen found no acute osseous injury. He found age indeterminate undersurface fraying of the anterior acetabular labrum without a discrete tear and mild left femoroacetabular joint chondrosis. Also, on June 23, 2015 Dr. Chen advised that a left knee MRI scan showed no acute meniscal tear or osseous/ligamentous injury. He found mild-to-moderate chondromalacia patella. In a September 24, 2015 cervical spine MRI scan report, Dr. Chen observed mild degenerative disc disease, worse at C4-5, with a small broad-based age-indeterminate right paracentral disc

herniation causing mild canal stenosis without cord compression. On November 16, 2015 he related that a lumbar spine MRI scan revealed mild degenerative disc disease without disc herniation stenosis, or nerve root impingement. Dr. Chen found no acute osseous injury.

In April 12 and July 28, 2016 reports, Dr. Milind P. Desai, a radiologist, indicated that appellant had received a steroid injection in the left hip under fluoroscopy to treat her pain.

By letter dated September 15, 2016, counsel cited Board precedent and contended that where there was no conflict on other issues presented to an impartial medical examiner (IME), no special weight could be afforded to the IME's opinion on those issues.

In reports dated September 30 and November 18, 2016, Dr. Prodoehl reported appellant's left knee, left shoulder, and left hip complaints and findings on examination. He reiterated his impression of left shoulder impingement and left hip strain. Dr. Prodoehl provided an impression of left shoulder rotator cuff tendinitis and AC degenerative joint disease (DJD) and left knee DJD status post left knee arthroscopy.

By decision dated December 27, 2016, an OWCP hearing representative affirmed the July 28, 2016 decision. She found that Dr. McGovern's impartial medical opinion represented the special weight of the medical evidence and established that appellant's employment-related disability had ceased.

### **LEGAL PRECEDENT -- ISSUE 1**

Under FECA, once OWCP has accepted a claim it has the burden of proof to justify termination or modification of compensation benefits.<sup>4</sup> OWCP may not terminate compensation without establishing that the disability has ceased or that it was no longer related to the employment.<sup>5</sup> Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>6</sup>

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>7</sup> The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>8</sup>

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<sup>4</sup> *I.J.*, 59 ECAB 408 (2008); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

<sup>5</sup> *Charles E. Minniss*, 40 ECAB 708, 716 (1989).

<sup>6</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>7</sup> 5 U.S.C. § 8123(a).

<sup>8</sup> 20 C.F.R. § 10.321.

When there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation benefits effective August 21, 2016.

OWCP accepted that appellant sustained a sprain of the left shoulder and upper arm AC and sprain of other specified sites of the left hip, left thigh, left knee, and left leg on May 18, 2015 while in the performance of duty. It terminated her wage-loss compensation benefits finding that the accepted employment-related conditions no longer caused disability based on the opinion of the IME, Dr. McGovern, a Board-certified in orthopedic surgeon. It is OWCP that bears the burden of proof to justify modification or termination of benefits.<sup>10</sup>

OWCP referred appellant to Dr. McGovern for an impartial medical examination to resolve the conflict in medical opinion between Dr. Prodoehl, an attending Board-certified orthopedic surgeon, who opined that she continued to be totally disabled due to her May 18, 2015 work injuries, and Dr. Thompson, an OWCP referral physician also Board-certified in orthopedic surgery, who found that she had no work-related residuals and could return to work with no restrictions. OWCP properly referred appellant to Dr. McGovern to resolve the conflict in medical opinion evidence, pursuant to 5 U.S.C. § 8123(a).

In a March 25, 2016 report, Dr. McGovern reviewed the SOAF and appellant's medical record. He documented essentially normal findings on examination. Dr. McGovern found that appellant had left shoulder strain and left knee sprain as a result of the May 18, 2015 work injuries. He opined that she only had mild residual stiffness in her left shoulder due to her accepted work injuries and could return to full-duty work as a rural carrier with no restrictions. Dr. McGovern further opined that the accepted conditions should not be expanded because appellant's preexisting arthritis in the left knee, left shoulder, and left hip as noted on diagnostic test results was not aggravated by the May 18, 2015 work injuries.

The Board finds that Dr. McGovern's opinion is based on a proper factual and medical background and is sufficiently well rationalized such that it is entitled to the special weight accorded to an IME and establishes that appellant has no continuing disability due to her accepted employment injuries.

The remaining evidence submitted prior to the termination of compensation is insufficient to overcome the weight accorded Dr. McGovern as an impartial medical specialist regarding whether appellant had any remaining work-related disability.

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<sup>9</sup> S.R., Docket No. 09-2332 (issued August 16, 2010); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

<sup>10</sup> See *Curtis Hall*, 45 ECAB 316 (1994); see also *K.B.*, Docket No. 15-0011 (issued April 7, 2015).

Dr. Khan's August 11, 2015 diagnostic test results addressed appellant's left shoulder conditions, but did not offer an opinion on the relevant issue of whether she had continuing employment-related disability due to the accepted work injuries. The Board has found that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.<sup>11</sup>

Dr. Doyle's July 25, 2016 report found that appellant had moderate major depressive disorder and somatic symptom disorder with pain and was totally disabled from work due to her June 22, 2010, September 21, 2012, and May 18, 2015 work injuries. These conditions have not been accepted by OWCP as work related.<sup>12</sup> While Dr. Doyle provided an opinion on causal relationship, he did not offer medical rationale explaining how the diagnosed conditions and resultant disability were caused or aggravated by the accepted injuries in the present claim. The Board has found that a medical opinion not fortified by medical rationale is of diminished probative value.<sup>13</sup>

The notes from appellant's physical therapist have no probative medical value as a physical therapist is not considered a physician as defined under FECA.<sup>14</sup>

Before OWCP and on appeal before the Board, counsel cited Board precedent and contended that Dr. McGovern's report is not entitled to special weight as OWCP inappropriately merged the issues of whether appellant had any continuing employment-related residuals and whether she had any work-related disability. As stated, it referred her to Dr. McGovern to resolve a conflict in medical opinion between Dr. Prodoehl and Dr. Thompson regarding whether she had any disability causally related to her accepted May 18, 2015 work injuries. The referral was not based on a conflict in medical opinion regarding whether appellant had any continuing residuals of her accepted employment injuries. As such, the Board finds that OWCP properly adjudicated the issue of whether she had any continuing employment-related disability. As explained, OWCP has not terminated medical benefits.

Counsel further contends on appeal that the SOAF provided to Dr. McGovern failed to accurately describe the mechanism of injury and to include appellant's two prior work injuries. He asserts that Dr. McGovern agreed with the attending physician's opinion that she had continuing residuals of her current work injury and created a new conflict in medical opinion regarding the level of her impairment. Counsel maintains that there remains an unresolved conflict in the medical evidence and that the December 27, 2016 decision must be vacated and the matter remanded for further development. The Board notes that the SOAF reviewed by

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<sup>11</sup> *K.H.*, Docket No. 16-0776 (issued October 19, 2016).

<sup>12</sup> See *T.M.*, Docket No. 08-0975 (issued February 6, 2009) (where a claimant claims that a condition not accepted or approved by OWCP was due to an employment injury, the claimant bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence).

<sup>13</sup> See *R.C.*, Docket No. 15-0315 (issued May 4, 2015); *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).

<sup>14</sup> See *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

Dr. McGovern contains an accurate description of the accepted May 18, 2015 work incident and appellant's injuries arising therefrom. Further, the record before the Board does not indicate that OWCP combined her prior accepted claims with the instant accepted claim, and thus, there was no need to include the prior work injuries in the SOAF reviewed by Dr. McGovern. Moreover, no conflict was created in the medical opinion evidence between Drs. McGovern and Prodoehl as Dr. McGovern found that, despite residuals of symptoms from the accepted conditions, she could perform the regular full-time work of her position.

Lastly, counsel argues on appeal that OWCP neglected to address Dr. Doyle's report that establishes that appellant sustained an emotional condition as a consequence of her accepted work injuries. Contrary to counsel's contention, OWCP, in its July 28, 2016 decision, referenced Dr. Doyle's July 25, 2016 report and described it as insufficient to establish that she sustained an emotional condition as a consequence of the accepted May 18, 2015 employment injuries. However, the final decision did not include that finding in its holding and therefore is not a final decision before the Board pursuant to 20 C.F.R. § 501.2(c)(1).

### **LEGAL PRECEDENT -- ISSUE 2**

Once OWCP properly terminates appellant's compensation benefits, the burden shifts to appellant to establish that he or she has continuing disability after that date related to the accepted injury.<sup>15</sup> To establish causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such a causal relationship.<sup>16</sup> Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.<sup>17</sup>

### **ANALYSIS -- ISSUE 2**

Following the termination of her wage-loss compensation benefits appellant submitted Dr. Prodoehl's September 30 and November 18, 2016 reports. In these reports, Dr. Prodoehl noted findings on physical examination and provided an impression of left shoulder impingement, left hip strain, left shoulder rotator cuff tendinitis and AC DJD, and left knee DJD status post left knee arthroscopy. The Board finds that he failed, however, to offer a medical opinion on causal relationship between the diagnosed conditions and the accepted work injuries.<sup>18</sup> Moreover, the Board has long held that reports from a physician who was on one side of a medical conflict that an medical impartial specialist resolved, are generally insufficient to overcome the special weight accorded to the report of the IME, or to create a new conflict.<sup>19</sup> The Board notes that as Dr. Prodoehl was on one side of the conflict resolved by Dr. McGovern,

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<sup>15</sup> See *Manuel Gill*, 52 ECAB 282 (2001).

<sup>16</sup> *Id.*

<sup>17</sup> *Paul Foster*, 56 ECAB 208 (2004); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>18</sup> *Supra* note 11.

<sup>19</sup> *I.J.*, 59 ECAB 408 (2008).

Dr. Prodoehl's additional reports are of insufficient weight to overcome the special weight accorded to Dr. McGovern's opinion or to create a new medical conflict.

Dr. Chen's June 23, September 24, and November 16, 2015 diagnostic test results addressed appellant's left hip and knee, cervical, and lumbar conditions, but did not offer an opinion stating that the diagnosed conditions and any resultant total disability were caused by the May 18, 2015 work injuries.<sup>20</sup> Likewise, Dr. Desai's April 12 and July 28, 2016 reports, noting appellant's treatment, are of limited probative value as the physician did not offer an opinion regarding whether any diagnosed condition and resulting disability were causally related to the May 18, 2015 work injuries.<sup>21</sup>

The Board finds that appellant did not establish continuing disability after November 15, 2015 causally related to the accepted injuries.<sup>22</sup>

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation benefits effective August 21, 2016. The Board further finds that appellant has not met her burden of proof to establish continuing disability after August 21, 2016.

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<sup>20</sup> See *supra* note 11.

<sup>21</sup> See *supra* note 11.

<sup>22</sup> *Virginia Davis-Banks*, 44 ECAB 389 (1993); *Dorothy Sidwell*, 41 ECAB 857 (1990).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 27 and July 28, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.<sup>23</sup>

Issued: December 15, 2017  
Washington, DC

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>23</sup> Colleen Duffy Kiko, Judge, participated in the original decision, but was no longer a member of the Board effective December 11, 2017.